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No. 73-91

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHEVRON OIL COMPANY, WESTERN DIVISION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–28) is reported at 475 F. 2d 842. The orders of the Federal Power Commission (Pet. App. 29–50) are reported at 46 FPC 43, 46 FPC 616, 46 FPC 1323, and 47 FPC 309.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1973. A petition for rehearing was denied on April 11, 1973 (Pet. App. 51–53), and the petition for a writ of certiorari was filed on July 10,

1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rulemaking procedures used by the Federal Power Commission in setting maximum rates for the sale of natural gas by producers in the Rocky Mountain area satisfy the requirements of the Due Process Clause of the Fifth Amendment, the Natural Gas Act, 15 U.S.C. 717, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*

STATUTES INVOLVED

Sections 4, 5, 15, 16, and 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717c, 717d, 717n, 717o, and 717r(b), and the pertinent provisions of the Administrative Procedure Act, as amended, 5 U.S.C. 551(4)–551(7), 553, 554, 556, 557, 559, and 706, are set forth at Pet. App. 54–68.

STATEMENT

A. BACKGROUND

The Federal Power Commission historically exercised its rate regulation functions under Sections 4 and 5 of the Natural Gas Act by conducting full adjudicatory proceedings on a company-by-company basis. After 1954, however, when this Court held in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, that independent producers are "natural-gas compan[ies]" within the meaning of Section 2(6) of the Act, the Commission was nearly overwhelmed in its effort to regulate the rates of some 2,500 producers.

In 1960, it ceased examining separately each producer's costs of service and undertook instead to determine maximum producers' rates for each of the major producing areas. Its authority to set area-wide maximum rates was upheld by this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747. The Permian Basin rate proceeding was the first of several area rate cases in which the Commission held extensive evidentiary hearings.[1] Its experience in conducting these laborious proceedings, together with this Court's observation in *Permian* that additional measures might be necessary to achieve "a more expeditious and effective system of regulation" (390 U.S. at 772, n. 37), led the Commission in 1969 to initiate an informal *rulemaking* proceeding to set maximum rates in the Appalachian and Illinois Basin areas (34 Fed. Reg. 17341).[2] The Commission's decision was issued less than one year later (44 FPC 1112).

As the seriousness of the nation's natural gas shortage became more apparent, the Commission—in order to ensure "an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining

[1] There were nearly 400 parties to the Permian proceeding, and hearings lasted almost two years. The Commission's decision was finally issued about five years after the proceeding was commenced (see 390 U.S. at 755, n. 4).

[2] The Commission stated in its notice of proposed rulemaking that "Staff's report and the comments of interested parties, supplemented by conferences and such limited hearings as might be requested and shown to be necessary by the commenting parties, should enable the Commission to reach conclusions in this case and to arrive at a proper rate order without a full-blown evidentiary hearing" (34 Fed. Reg. 17341).

an industry structure capable of providing, and motivated to provide, service with its attendant risks" (35 Fed. Reg. 11638)—commenced a rulemaking proceeding to set nationwide "initial rates" for sales of natural gas under contracts dated after June 17, 1970.[3] In Order No. 435, issued in July 1971 as part of that nationwide proceeding, the Commission established such initial rates for the Rocky Mountain area (36 Fed. Reg. 13585).[4]

B. PROCEEDINGS BEFORE THE COMMISSION

On the same day that the initial rates for the Rocky Mountain area were established, the Commission com-

[3] A company may sell natural gas in interstate commerce only pursuant to a certificate of public convenience and necessity issued by the Commission under Section 7 of the Act, 15 U.S.C. 717f. Section 7(e) authorizes the Commission to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require." This Court held in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, that among the factors to be considered in determining the public convenience and necessity is the initial rate proposal of the applicant, which would govern the applicant's sale of gas until "just and reasonable" rates were approved under Sections 4 and 5 of the Act. An "initial rate" proceeding thus sets the rates at which the Commission would issue permanent certificates under Section 7 pending completion of proceedings under Sections 4 and 5. See, also, *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223; *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9.

[4] There are eight producing areas. The Rocky Mountain area includes portions of Colorado, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming.

Order No. 435 is the subject of a petition for review pending in the Court of Appeals for the District of Columbia Circuit (*American Public Gas Association* v. *Federal Power Commission*, No. 71-1812).

menced by public notice a rulemaking proceeding to fix maximum "just and reasonable" rates for sales of natural gas by producers in the Rocky Mountain area under contracts dated before October 1, 1968 (Pet. App. 29–37). The notice stated that the Commission also proposed to determine whether the "initial rates" established by Order No. 435 for sales under contracts dated after June 17, 1970, should apply as well to contracts dated between October 1, 1968 and June 17, 1970.

All the large producers in the Rocky Mountain area and their pipeline purchasers were directed to file certain "flowing gas" cost and operational data for 1969.[5] The Commission's notice specified that the following rulemaking procedures would be employed upon receipt of the required data. First, the Commission staff would "composite and reconcile" the data and make the results available to all parties to the proceeding.[6] Each party would then have three weeks to file "[r]esponses in writing concerning this proposed rulemaking" (Pet. App. 32), and an additional two weeks to reply to the initial responses of other parties. The Commission would thereafter consider all the submissions before entering a final order. The notice also scheduled a "conference for the

[5] "Flowing gas," as used in this context, means gas that was being sold and transported in the interstate market pursuant to contracts dated prior to October 1, 1968.

[6] The producers and purchasers were made parties-respondent. In addition, the notice permitted "[a]ny interested person" to become a party by filing a notice of intention to respond to the proposed rulemaking (Pet. App. 30).

purpose of developing the issues and procedures to be followed in this proceeding" (Pet. App. 32), and permitted any party to request a further conference, which could be called at the discretion of the Commission staff.

Petitions for reconsideration or clarification were thereafter filed by several parties and were denied on September 7, 1971 (Pet. App. 38–42). In its order denying reconsideration, the Commission rejected the argument that full evidentiary hearings must be held prior to determining just and reasonable rates. It stated that the contention was "both premature and untenable at this stage of the proceeding" because "no evidence has as yet even been submitted" and "[p]etitioners have not set forth with any specificity either the evidence they wish to cross-examine or rebut, or the testimony they have been precluded from presenting" (Pet. App. 40). Moreover, since the petitioners had "not shown that they would be prejudiced by the procedures adopted in our notice" (Pet. App. 41), the Commission ruled that it was permissible to require written submissions in lieu of an oral hearing.

A petition for review was thereupon filed in the court of appeals. Other petitions, filed later in the District of Columbia Circuit, were transferred to the court below and there consolidated with the earlier petition.

After some of the comments on the Commission's proposed rulemaking had been submitted, but before the parties' replies were due, several of the parties filed a further motion with the Commission seeking an opportunity to conduct broad cross-examination of

"all persons who contributed to or participated in the preparation of" large portions of the comments and data submitted by other parties (Pet. App. 44). The Commission denied the motions (Pet. App. 43–47). It ruled that "[s]uch an all-encompassing request, lacking in specificity, and without a showing of prejudice * * *, must be rejected" (Pet. App. 44). To grant the motion "would require the return to the lengthy, adjudicatory hearings * * *, which we stated we desired to avoid" (*ibid.*). "We need not * * * lose ourselves in an excursion into detail which would obscure, rather than clarify, the issues before us" (Pet. App. 44–45).

The Commission thereafter denied another set of motions to reconsider its order denying cross-examination (Pet. App. 48–50). Additional petitions for review were then filed in the courts of appeals and transferred to the court below for consolidation with the earlier petitions.

C. THE DECISION BELOW

The court of appeals, with one judge dissenting, denied the petitions for review (Pet. App. 1–28). The court first considered, *sua sponte,* whether the Commission's orders were ripe for judicial review. It concluded that they were, because the petitions for review presented "a pure question of law" and because "the hardship to the petitioners which would result from refusal to review the question would be of great magnitude" (Pet. App. 10).

On the merits, the court held that the hearing requirement of Section 5 of the Natural Gas Act could

be satisfied by the informal rulemaking procedures adopted by the Commission. Relying on Section 15(b) of the Act,[7] and on this Court's opinion in *Permian*, the court concluded that the Natural Gas Act does not require a formal evidentiary hearing in an area rate-making proceeding. The court also held that, since Section 5 does not require a hearing "on the record," the Administrative Procedure Act permits the Commission to use the informal rulemaking procedures of 5 U.S.C. 553, rather than the formal procedures of 5 U.S.C. 556 and 557. It concluded that the procedures prescribed by the Commission's original notice satisfied the requirements of Section 553.[8]

ARGUMENT

The court of appeals properly rejected petitioners' principal contention that the Commission may not set area rates except after full evidentiary hearings with opportunity for oral cross-examination. With respect to that issue, the courts of appeals are in harmony and review by this Court is not warranted.

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[7] That Section provides in part: "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act."

[8] After this case was decided by the court of appeals, the Commission proceeded in accordance with its original notice. On April 11, 1973, it issued Order No. 658, which established maximum just and reasonable rates for sales under contracts dated prior to October 1, 1968, and maximum initial rates for sales under contracts dated between October 1, 1968, and June 17, 1970. Petitions for reconsideration were thereafter denied. Several parties then filed a petition for review in the Court of Appeals for the District of Columbia Circuit (*Exxon Corp., et al.* v. *Federal Power Commission, et al.*, No. 73-1854). On September 24, 1973, that court ordered that the petition be held in abeyance pending this Court's disposition of the present case.

In their Supplemental Brief, petitioners call the Court's attention to a recent decision of the Court of Appeals for the District of Columbia Circuit, which they claim is in conflict with the decision below. It is true that the two courts are in plain disagreement over the abstract issue whether the bare minimum required by the APA for informal rulemaking suffices in a Federal Power Commission rate proceeding. As we show below, however, the decisions themselves are reconcilable despite the conflict in reasoning. Moreover, the issue on which the two courts have expressed theoretical disagreement is of minimal importance, because the Commission has determined for cases to employ procedures that would satisfy the requirements of both courts.

1. Petitioners contend (Pet. 7–13) that the ratemaking procedure set forth in the Commission's notice of proposed rulemaking in this case would violate the due process clause of the Fifth Amendment, because it does not permit "cross-examination [or] effective rebuttal" (Pet. 13) and because it portends a decision based on matters outside the record. The contention is both factually and legally incorrect.

First, while it is true that the procedure established by the Commission does not allow for oral cross-examination by the parties, it does ensure an opportunity for "effective rebuttal." The notice provides that composites of the data submitted in this proceeding will be available for public inspection at all times, and it affords all parties an opportunity to submit both written comments and replies to the comments of

other parties (Pet. App. 31–32). This procedure satisfies the notice and hearing requirements of the due process clause. There is no constitutional right to an oral hearing with opportunity for cross-examination where, as here, the proposed ratemaking would be "applicable across the board to all" the parties and where "[n]o effort was made to single out any particular [party] for special consideration based on its own peculiar circumstances" (*United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 246).

Second, the Commission never stated an intention to consider extra-record information. The statement quoted by petitioners (Pet. 12)—that the Commission proposed to "bring to bear data and expertise * * * gained in related proceedings"—does not relate to this case. It appears in a notice of proposed rulemaking with respect to nationwide just and reasonable rates, which was issued on April 11, 1973, long after the issuance of the orders in this case and, indeed, after the issuance of the opinion of the court below.[9]

2. Petitioners next contend (Pet. 14–19) that the procedures established by the Commission would vio-

[9] While the Commission's statement is not part of the record in this case, we note that the Constitution does not prohibit an administrative agency from bringing to bear in a particular proceeding general information and regulatory experience acquired over the years through the exercise of its statutory responsibilities. See *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 559–561; *City of Chicago* v. *Federal Power Commission*, 458 F. 2d 731, 745–748 (C.A.D.C.), certiorari denied, 405 U.S. 1074.

late both the Natural Gas Act and the Administrative Procedure Act. This contention is apparently made under two theories.

a. First, petitioners argue that the formal hearing procedures of Sections 556 and 557 of the Administrative Procedure Act must be followed in Federal Power Commission rate proceedings. But those Sections—which require a full evidentiary hearing before a hearing officer, an initial decision, and review by the Commission—come into play with respect to rulemaking only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c)).

Accordingly, "Sections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record."'" *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757. That rule applies in the context of agency ratemaking. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224. Neither the ratemaking provisions (Sections 4 and 5) nor the rulemaking provisions (Section 16) of the Natural Gas Act, 15 U.S.C. 717c, 717d, 717o, require a hearing "on the record."

We recognize, of course, that those specific words are "not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings" (*Florida East Coast, supra,* 410 U.S. at 238). But the two courts of appeals that have addressed the

issue—the court below and the Court of Appeals for the District of Columbia Circuit—have correctly concluded that neither the provisions of the Natural Gas Act nor its legislative history supports petitioners' contention that the Act requires a formal evidentiary hearing in Federal Power Commission ratemaking proceedings. See Pet. App. 15–18; *Mobil Oil Corp.* v. *Federal Power Commission*, C.A.D.C., No. 72–1471, decided July 11, 1973 (Pet. Supp. Br. App. 22–24).

Petitioners seek to contrive the equivalent of an "on the record" requirement by looking to the provisions, contained in other sections of the statute, that "records * * * shall be kept" of hearings before the Commission (Section 15(a)), that upon the filing of a petition for review the Commission shall file with the court the record on which the challenged order was issued (Section 19(b)), and that the Commission's findings shall be conclusive if supported by substantial evidence (Section 19(b)). These innocuous requirements—the first two of which impose only ministerial obligations on the agency—add nothing to the "after a hearing" language in Section 5(a). Viewed in the light of Section 15(b)—which specifies that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation"—the isolated words cited by petitioners surely do not amount to an "on the record" requirement that would invoke the formal procedures of Sections 556 and 557.

b. In their supplemental brief, petitioners suggest a more limited argument—that even if a formal eviden-

tiary hearing is not necessary, something more than the bare minimum for informal rulemaking is required. They rely on *Mobil Oil Corp.* v. *Federal Power Commission, supra,* which they say conflicts with the decision below. There is no doubt that the two courts have expressed disagreement over the theoretical issue whether the barebones requirements of Section 553 of the Administrative Procedure Act—which requires only notice and an opportunity to submit "written data, views, or arguments"—would suffice in a Commission rulemaking proceeding. Properly viewed, however, the decisions themselves are not in conflict.

In the order under review in *Mobil,* the Commission had set minimum pipeline rates for the transportation of certain liquid and liquefiable hydrocarbons. As the court of appeals' opinion details (Pet. Supp. Br. App. 8–14), the Commission issued its order without having given adequate public notice that it intended to fix minimum rates in the proceeding; "in fact, the implication was to the contrary" (*id.* at 9). Consequently, no data or comments were submitted with respect to the question of rates. Two and one-half years after the original public notice, the Commission staff convened a conference of the parties to seek factual data bearing on minimum rates, but the request was deferred pending the disposition of a similar rate issue in another proceeding. Thereafter, without further notice or evidence, the Commission established the minimum rates at issue.

On these facts, the court of appeals held that the Commission failed to give fair notice and to compile an adequate record (Pet. Supp. Br. App. 50). It also held, alternatively, that something more than the minimum notice and comment requirements of Section 553 must be accorded to parties in a Commission rulemaking proceeding. The Court reasoned as follows: Section 19(b) of the Natural Gas Act requires the courts to sustain Commission findings that are supported by "substantial evidence"; this implies that there must be substantial evidence "on the whole record"; a "whole record" requires "some sort of adversary, adjudicative-type procedures" (*id.* at 41). These procedures, it held, need not be formal and need not include an opportunity for oral presentation, but they "must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others" (*id.* at 40; emphasis omitted). The court expressly disagreed with the contrary reasoning of the court of appeals in the present case (*id.* at 46–47).

We agree that the reasoning of the two courts differs on the abstract question whether the Commission may properly set rates through the minimum procedures required under Section 553 of the Administrative Procedure Act. We submit, however, that there is no need for this Court to resolve that theoretical disagreement in this case.

First, the decisions below are reconcilable. The procedures followed by the Commission in *Mobil* could not have met even the minimal requirements of the opinion below, and the procedures followed in the

present case might well have satisfied the higher standards of the *Mobil* opinion. The court in *Mobil* specifically stated (Pet. Supp. Br. App. 50) that, even if it had agreed with the reasoning of the court below in the present case, "the lack of fair notice and an adequate record on which the prices were set here would still require us to remand this case." Conversely, the procedures followed by the Commission in the present case—including submission of data by the parties, reconciliation of that data by the Commission staff, opportunity to submit comments in light of that reconciliation, and further opportunity to respond to the comments of other parties—probably would satisfy the D.C. Circuit's requirement in *Mobil* of a "mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others" (*id.* at 40; emphasis omitted).

Second, even if the conflict in *reasoning* would otherwise justify review by this Court, that conflict is of little continuing importance. The Commission has determined to follow, in the national rulemaking proceedings that are currently pending,[10] procedures similar to those followed in the present case. Thus, the issue on which the courts of appeals disagree—*i.e.*, whether the Commission *could* get by on less—need not be resolved at this time.

[10] The Commission has commenced proceedings to set nationwide just and reasonable rates for sales of gas from wells commenced on or after January 1, 1973 (38 Fed. Reg. 10014) and from wells commenced before January 1, 1973 (38 Fed. Reg. 14295).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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